CHAPTER IX

The Judicial System of Islam

Special Contribution of Muslims

by Dr. Muhammad Hamidullah

This is a slightly edited excerpt from Introduction to Islam, by Dr. Muhammad Hamidullah

LAW has existed in human society from time immemorial. Every race, every region, and every group of men has made some contribution in this sphere. The contribution made by Muslims is as rich as it is worthy and valuable.

Science of Law

301. The ancients have all had their particular laws, yet a science of law, abstract in existence and distinct from laws and codes, does not seem to have ever been thought of before Shafi'i [1] (150-204 A.H./767-820 C.E.). The work of this jurist (*Risalah*) designates this science under the expressive name of *usal al-fiqh* (Roots of Law) from which shoot the branches of the rules of human conduct. Since then, this science which was called *Usul al-Fiqh* among the Muslims, treats together with the philosophy of law, sources of rules, and principles of legislation, interpretation and application of legal texts. These latter, i.e., laws and rules are called *furu*' (branches) of this tree. Apparently these authors were inspired in the choice of the terms by the Quranic verse (14:24-25): "the example of a goodly word is like a goodly tree: its roots set firm, its branches reaching into heaven, giving its fruit at every season by permission of its Lord."

Intention in Act

302. Among the novelties in the domain of fundamental notions of law, it may be pointed out that the importance given to the conception of motive and intention (*niyah*) in acts. This notion is based on the celebrated saying of the Prophet of Islam (d. 632 of Christian era): "**The acts are not** (to be judged) **except by motives**." Ever since, an intentional tort or crime, and one caused involuntarily, have not been treated alike by Muslim tribunals.

Written Constitution of State

303. It is interesting as well as inspiring to note that the very first revelation (Qur'an 96:1-5) received by the Prophet of Islam, who was an unlettered person himself, was the praise of the pen as a means of learning unknown things, and as a grace of God. It is not surprising that, when the Prophet Muhammad endowed his people with a unique form of state, created out of nothing, he promulgated a written constitution for this State, which was a city-state at first, but only ten years later, at the moment of the demise of its founder, extended over the whole of the big Arabian Peninsula, and the southern portions of Iraq and Palestine. [2] After another fifteen years, during the caliphate of 'Uthman, there was an astonishing penetration of Muslim armies to Andalusia (Spain) on the one hand, and the Chinese Turkestan [3] on the other, they having already occupied the countries that lay in between. This written constitution, prepared by Prophet Muhammad, which consists of 52 clauses, has come down to us *in toto* (cf. Ibn Hisham, for instance). It addresses a variety of questions, such as the respective rights and duties of the ruler and the ruled, legislation, administration of justice, organization of defence, treatment of non-Muslim subjects, social insurance on the basis of mutualism and other requirements of that age. The Act dates from 622 of the Christian era [C.E.] (the first year of the *Hijrah*).

Universal International Law

304. War, which unfortunately has always been very frequent among the members of the human family, is a time when one is least disposed to behave reasonably and do justice against one's own self, and in favour of one's adversary. As it is really a question of life and death, and a struggle for very existence, in which the least mistake or error would lead to dangerous consequences, the sovereigns and heads of States have always claimed the privilege to decide, at their discretion, the measures they take in regard to the enemy. The science relating to such behaviour of independent sovereigns has existed from very old times,

but it nevertheless formed a part of politics and mere discretion and was, at the most, guided by experience. The Muslims seem to have been the first to separate this science of public international law from the changing whims and fancies of the rulers of the State, and to place it on a purely legal basis. Moreover, it is they who have left to posterity the oldest extant works on international law, developed as an independent science. Among authors of such treatises, we find names of such eminent personalities as Abu Hanifah, Malik, al-Auza'i, Abu Yousuf, Muhammad ash-Shaibani, Zufar, al-Waqidi, etc. They all called the subject *siyar* (conduct, i.e., of the sovereign). Further, in the ordinary codes of law (the oldest extant work hails from Zaid ibn 'Ali who died in 120 or 122 A.H., and also by every subsequent author) one speaks of this subject as forming part of the law of the land. In fact one speaks of it immediately after the question of highway robbery, as if war could be justified for the same reason as police action against highwaymen. The result is that belligerents have both rights and obligations, cognizable by Muslim courts.

General Characteristics of the Muslim Law Code

305. The first thing which strikes the imagination of the reader of a manual on Islamic law is that this law seeks to regulate the entire field of human life, in its material aspect as well as the spiritual one. Such manuals begin usually with the rites and practices of cult, and discuss under this rubric also the constitutional question of sovereignty, since the *imam,* i.e., the head of the State is *ex officio* leader of the service of worship in the mosque (cf. Kitab al-Umm of Shafi'i, ch. salat). One should not therefore be astonished that this part of law books deal also with the subject of the payment of taxes. Since the Qur'an has often spoken of worship and the *zakat*-tax in the same breath, worship being bodily service and the tax the service of God by means of money. Thereafter the law manual discusses contractual relations of all sorts; then the crimes and penalties, which include laws of war and peace with foreign countries, i.e., international law and diplomacy also; and finally the rules governing heritage and wills. Man is composed of both body and soul, and if the government, with its enormous resources at its disposal, attends exclusively to material affairs, the soul would be famished, being left to its own private resources (very meagre in comparison with those available in temporal affairs.) The unequal developments of body and soul will lead to a lack of equilibrium in man, the consequences of which will in the long run be disastrous to civilization. This treatment of the whole, of both body and soul, does not imply that the uninitiated should venture in the domain of religion, just like a poet should not be allowed to perform surgical operations for instance. Every branch of human activity must have its own specialists and experts.

306. Another feature of the Islamic law seems to be the emphasis laid on the correlativity of right and obligation. Not only the mutual relations of men among themselves, but even those of men with their Creator are based on the same principle; and cult is nothing but the performance of the duty of man corresponding to the rights to the usufruct [4] of worldly things that Providence has accorded him. To speak only of the "rights of man," without simultaneously bringing into relief his duties would be transforming him into a rapacious beast, a wolf or a devil.

Philosophy of Law

307. The classical jurists, among Muslims, place laws on the duality of good and evil. One should do what is good and abstain from what is evil. Good and evil are sometimes absolute and self-evident, yet at other times merely relative and partial. This leads us to the five-fold division of all judicial rules, both orders and injunctions. Thus, all that is absolutely good would be an absolute duty, and one must do that. Everything which has a preponderant good would be recommended and considered meritorious. Things where both these aspects, of good and evil, are equal, or which have neither of them, would be left to the discretion of the individual to do or abstain from, at will, and even to change the practice from time to time. This category would be a matter of indifference to law. Things absolutely evil would be objects of complete prohibition, and, finally, things which have a preponderance of evil would be reprehensible and discouraged. This basic division of acts or rules into five categories may have other subdivisions with minute nuances like the directions on a compass in addition to the four cardinal points of north, south, east and west.

308. It remains to define and distinguish between things good and the evil. The Qur'an, which is the Word of God and a revered Book by Muslims, speaks of these on many occasions, and says that one must do the *ma'ruf* and abstain from the *munkar*. Now, *ma'ruf* means a good which is recognized as such by everybody and which is considered by reason to be good, and therefore is commanded. Munkr means a thing which is denounced by everyone as having no good whatsoever and is an evil which is recognized as such by everybody, and that which

is considered by reason to be evil would be forbidden. A very great part of Islamic morality belongs to this domain, and the cases are very rare where the Qur'an forbids a thing in which there is a divergence of human opinion, such as the prohibition of alcoholic drinks, or games of chance. But to tell the truth, the *raison-d'etre* of law even in such cases is not concealed from thoughtful, mature minds. In practice, this is a question of confidence in the wisdom and intelligence of the Legislator, whose directions in all the other cases have occasioned nothing but universal approbation.

The Sanctions

309. One meets among the members of the human race a most varied temperament, and these could be divided into three big categories: (1) those who are good and resist all temptations of evil, with- out in the least being compelled by anybody thereto, (2) those who are bad, and seek, in every way to escape even from the most strict supervision, and finally (3) those who behave in a suitable manner as long as they fear reprisal, but who would also permit themselves injustice when there are temptations with a chance of escaping detection. Unfortunately the number of individuals of the first category is very restricted; they need neither guides, nor sanctions in the interest of society. The disposition of the spirit to do harm to others may be a sickness, a remnant of the criminal animality, a result of bad education, or due to other causes. An attempt will be made to control and counteract the possible harm done by men of the second category, whose number, fortunately, is also not very great. There remains the third or the intermediate category which is the very vast majority of men. They require sanctions, but of what kind?

310. It goes without saying that if a chieftain himself has a bad conscience, having committed a prohibited thing, he would have little courage to reproach others about that thing. Therefore Islam has struck at the root and the source of this kind of evil, and declared that nobody is exempt from obligations, not even the sovereign, and not even the Prophet. The teaching as well as the practice of the Prophet Muhammad, followed by his successors, requires that the head of the State should be capable of being cited before the tribunals of the country, without the least restriction. The Islamic tradition has been that judges never hesitated in practice to decide even against their sovereigns in cases of default.

311. It is needless to mention in detail the material sanctions which exist in Islam just like in all other civilizations. Thus there are services which are charged with the maintenance of law and order, watch and ward, peace and tranquillity in the mutual relations of the inhabitants of the country. And if anybody is victim of violence he can complain before the tribunals, and the police would drag the accused to appear before the judges, whose decision is finally executed.

312. But the conception of society, as envisaged by the Prophet of Islam, has added another sanction, perhaps more efficacious than the material one, and that is the spiritual sanction. Maintaining all the administrative paraphernalia of justice, Islam has inculcated in the minds of its adherents the notion of resurrection after death, of Divine Judgement and salvation or condemnation in the Hereafter. It is thus that the believer accomplishes his obligations even when he has the opportunity of violating them with impunity, and he abstains from doing harm to others in spite of all the temptations and the enjoyment of security against the risk of retaliation.

313. This triple sanction – of rulers being equally subject to the general law, material sanctions and spiritual sanctions, each element of which strengthens the efficacy of the other – tries to secure in Islam the maximum observance of laws and the realization of the rights and obligations of all. It is more efficacious than a system in which only one of these sanctions are acquired.

The Legislation

314. In order to better understand the implication of the affirmation that God is the supreme Legislator, we have to think about different aspects of the question.

315. Islam believes in One God, Who is not only the Creator of all, but also the Sustainer, the *sine qua non* of the very existence of the universe. He is not "placed on the retired list" after having created what He has created. Furthermore, Islam believes that God is transcendent and beyond all physical perception of man, and that He is *omnipresent* [present everywhere], *omnipotent* [All-powerful]*just* and*merciful*. Moreover, in His great mercy, He has given man not only reason but also guides, chosen from among men themselves, instructed in the directions which are most wise and most useful to human society. God being transcendent [beyond reach or grasp of human experience], He sends

His messages to His chosen men by means of intermediate celestial message-bearers.

316. God is perfect and eternal. Among men, on the contrary, there is constant evolution. God does not change His opinions, but He exacts from men only that which accords with their individual capacities. That is why there are divergences, at least in certain details, among various legislation, each of which claims to be based on Divine revelations. In legislative matters, the latest law abrogates and replaces all the former ones; the same is true of Divine revelations.

317. Among Muslims, the Qur'an, which is a book in the Arabic language, is the Word of God, a Divine revelation received by the Prophet Muhammad and destined for his adherents. Moreover, in his quality of being the messenger of God, Muhammad, of the holy memory, has explained the sacred text, and given further directions; and these are recorded in the *Hadith*, or the collection of the reports on the sayings and actions of the Prophet Muhammad.

318. It goes without saying that the laws promulgated by an authority can only be abrogated by itself or by a superior authority, but not by an inferior one. So a Divine revelation can be abrogated only by another posterior Divine revelation. Similarly the directions of the Prophet can only be modified by himself or by God, but not by any of his disciples or an other person. In practice, in Islam this theoretical aspect of rigidity becomes quite elastic in order to permit men to adapt themselves to exigencies and circumstances:

(i) The laws, even those of Divine origin or emanating from the Prophet, are not all of the same range. We have just seen that only some of these are obligatory, whereas others are only recommended, while in the rest of the cases, the law allows great latitude to individuals. A study of the sources shows that the rules of the first category, i.e., the obligatory ones, are very few in number. Those rules which are recommended are more numerous and cases where the text is silent are innumerable.

(ii) An inferior authority will not change the law, yet it may interpret it. The power of interpretation is not the monopoly of any person in Islam because every man who makes a special study of the subject has the right to do that. A sick man would never consult a poet, or even a laureate who has gained a Nobel prize . . . to con- struct a house, one does not consult a surgeon, but instead consults an engineer. In the same way, for legal questions, one must study law and perfect one's knowledge of the subject for the opinion of persons outside the profession will only be speculative. The interpretations of the specialists show the possibility of adapting even the Divine law to circumstances. Since Muhammad (being the last of the prophets) has left this world (as all mortals must), there is no more possibility of receiving a new revelation from God to decide problems in the case of divergence of interpretations. Inevitably there must be a divergence of opinion on matters, since all men do not think in the same manner. It may be pointed out that judges, jurisconsults or other experts of law are all human beings, and if they differ among themselves, the public will follow the one who appears to be more authoritative. In a judicial litigation, the judge is obeyed, whereas in other cases, the schools of law obtain priority in the eyes of the adherents of their respective schools.

(iii) Prophet Muhammad has enunciated the rule. "**My people shall never be unanimous in an error**," (reported by Ibn Hanbal, Tirmidhi, lbn Majah and others). Such a negative consensus has great possibilities of developing Islamic law and adopting it to changing circumstances. The spirit of investigation is never strangled. On the contrary, this Hadith seems to lay down that every opinion which is not rejected unanimously will not involve excommunication.

(iv) A celebrated incident of the life of the Prophet Muhammad reported by a large number of sources, deserves mention:

> Mu'adh ibn Jabal, a judge-designate of Yeman, paid a visit to the Prophet to take his leave before departure to take up office. The following conversation took place: "**On what basis shalt thou decide litigation?** – According to the provisions in the Book of God (the Qur'an)! – **And if thou dost not find any provision therein**? – Then according to the conduct of the Messenger of God (i.e., Muhammad)! – **And if thou dost not find a provision even therein?** – Well, then, I shall make an effort with my own opinion!" The Prophet was so delighted at this reply, that far from reproaching him, he exclaimed, "**Praise be to God Who hath guided the envoy of His envoy to what pleaseth the envoy of God!**"

This individual effort of opinion and common sense on

the part of an honest and conscientious man is not only a means of developing the law, but also a recipient of the benediction of the Prophet.

(v) It may be remembered that in legislation on a new problem, in the interpretation of a sacred text, or in any other case of development of the Islamic law, even when it is occasioned on the basis of a consensus, there is always the possibility that one rule adopted by a process would later be replaced by another rule, by later jurists using the same process. Opinion of an individual by the opinion of another individual, a consensus by another consensus (cf. al-Pazdawi, Usul). (This refers to *opinions of jurists only*, and has nothing to do with the Qur'an or the authentic Hadith. For God's order can only be abrogated by God Himself, and by no-one else; a Prophet's order by a Prophet or by God, and not by an inferior authority of a jurist or a parliament).

319. History has shown that the power of "legislation" has been vested in Islam in private savants, who are outside official interference. Such legislation would neither suffer from the influence of daily politics, nor serve the interests of particular persons, even if they were heads of State. Each of the jurists, being all equal, them can freely criticise the opinion of the other, thus providing the possibility of bringing into relief all the aspects of a problem, either immediately or in the course of future generations, and so arrive at the best solution.

320. Thus one sees that the Divine origin of legislation in Islam does not render it rigid out of all proportion. What is more important still is that this quality of the Divine origin of law inspires in the believers an awe for the law, in order that it may be observed conscientiously and scrupulously. It may be added that the jurists of classical times have unanimously declared that, *"All that the Muslims consider good, is good in the eyes of God*" – even if it does not concern a saying of the Prophet himself. (To Sarakhsi it is a Hadith of the Prophet; Ibn Hanbal has known it as a saying of lbn Mas'ud, the Companion of the-Prophet). The consensus, in the light of this interpretation, implies that even the deduction of lay savants, entails Divine approval, a fact which adds to the respect of law in the eyes of men.

Administration of Injustice

321. A characteristic feature of the Quranic legislation in this respect is the judicial autonomy accorded to different communities comprised of subjects. Far from imposing the Quranic law on everyone, Islam welcomes and even encourages every group, Christian, Jewish, Magian or other to have its own tribunals presided over by its own judges, in order to have its own laws applied in all branches of human affairs, civil as well as criminal. If the parties to a dispute belong to different communities, a kind of private international law decides the conflict of laws. Instead of seeking the absorption and assimilation of everybody in the "ruling" community, Islam protects the interests of all its subjects, (see paragraph 293).

322. As for the administration of justice among Muslims, apart from its simplicity and expediency, the institution of the "purification of witnesses" is worth mentioning. In fact, in every locality, tribunals organize archives regarding the conduct and habits of its inhabitants, in order to know, when necessary, whether a witness is trustworthy. It is not left only to the opposite party to weaken the value of an evidence. The Qur'an (24:4) has said that, if someone accuses the chastity of a woman and does not prove it according to the judicial exigencies, not only is he punished, but is also rendered, forever after to be unworthy of testimony before tribunals.

Origin and Development of Law

323. Prophet Muhammad taught theological and eschatological dogmas to his adherents. He also gave them laws concerning all activities of life, individual as well as collective, temporal as well as spiritual. In addition, he created a State out of nothing, which he administered, built up armies which he commanded, set up a system of diplomacy and foreign relations which he controlled; and if there were litigations, it was he who decided them among his "subjects." So, it is to him rather than anyone else that one should turn in order to study the origin of the Islamic law. He was born into a family of merchants and caravan-leaders, who inhabited Mecca. In his youth he had visited the fairs and markets of Yemen and of Eastern Arabia, (i.e., 'Uman, cf. Ibn Hanbal IV, 206) as well as of Palestine. His fellow-citizens used to go also to Iraq, Egypt and Abyssinia with the object of trade. When he began his missionary life, the violent reaction of his compatriots obliged him to go into exile and settle down in another town, Madinah, where agriculture was the principal means of livelihood of its inhabitants. There he organised a type of state, the first a city-state was established, which was gradually transformed into a State which extended, at the time of his death, over the entire Arabian Peninsula together

with some parts of Southern-Iraq and Palestine. International caravans traversed Arabia. It is well known that the Sassanians and the Byzantines had occupied certain regions of Arabia, and established colonies or protectorates. In some fairs, particularly of Eastern Arabia, merchants were attracted every year as far away as India, China, and "from the East and from the West" as Ibn al-Kalbi and al-Mas'udi have described. There were not only nomads in Arabia, but also settled people, of whom the Yemenites and Lihyanites had developed a civilization dating from before the foundation of the cities of Athens and Rome.

324. The customary laws of the country were transformed, when Islam came, into statal acts of legislation. And the Prophet had, for his adherents and subjects, the prerogative not only of modifying the old customs, but of also promulgating entirely new laws. His status as the messenger of God was responsible for the exceptional prestige he held. So much so that not only his words, but even his acts also constituted law for the Muslims in all walks of life. Even his very silence implied that he did not oppose a custom which was practised around him by his adherents. This triple source of legislation, *viz*., his words, which are all based on Divine revelation, his deeds, and his tacit approval of the practices and customs of his adherents, has been preserved for us in the Qur'an and the *Hadith*. While he was still alive, another source began to germinate, *viz.*, the deduction and elaboration of rules, in cases where legislation was silent, and this was done by jurists other than the head of the State. In fact there were judges and jurisconsults, in the time of the Prophet, even in the metropolis, not to speak of provincial administrative centres. We have already mentioned the instructions given to Mu'adh when he was sent to Yemen as Judge. There were cases when the provincial functionaries demanded instructions from the central government, which also took the initiative and intervened in cases of incorrect decisions of the subordinates, if and when they came to the notice of the higher authority. The order to change or modify the ancient customs and practices, or the Islamisation of the law of the whole country, could only take place gradually, because the judges did not intervene except in cases brought to their attention. Cases not brought to their attention, in which the parties acted in ignorance of the law, according to their convenience, must have been numerous. For instance, a Muslim had been married to his own German sister; when the case was brought to the caliph 'Umar and he asked the explanation from the person concerned, this latter replied that he did not know that it was prohibited. The caliph separated them and demanded the man to pay damages to his sister, yet he did not inflict punishment on account of fornication or incest.

325. The death of the Prophet marks the cessation of the Divine revelations which had the force of ordering every law, abrogating or modifying every old custom or practice. Thereafter the Muslim community was obligated to be content with the legislation already accomplished by the Prophet, and with the means of the development of law authorized by this same legislation. "Development" does not mean abrogation of what the Prophet had legislated, but to know the law in case of the law being silent.

326. Of these, the most important were perhaps the following: on several occasions, the Qur'an (4:24, 5:1) has, after instituting certain prohibitions, expressly added that all the rest was lawful (in the domain concerned). So, all that does not go against the legislation emanating from the Prophet is permissible, and constitutes good law. The laws and even customs of foreign countries have always served as raw material for the Muslim jurists, in order to detach from them those that were incompatible with Islam, the rest being lawful. This source is continuous.

327. Another source, surprising perhaps, is the direction given by the Qur'an (6:90) that the Divine revelations received by the former prophets (and it has named almost a score of them, such as Enoch, Noah, Abraham, Moses, David, Solomon, Jesus, John the Baptist) are equally valid for Muslims. But its range and scope was limited only to revelations, the authenticity of which was proved beyond doubt, that is, those recognized expressly by the Qur'an or the Hadith to be so. The law of retaliation of Pentateuch is an instance mentioned in the Qur'an (5:45), when it is precisely said: "*God has prescribed that on Jews*", without adding "*and on you*".

328. Only fifteen years after the death of the Prophet, we see the Muslims ruling over three continents, over vast territories in Asia and Africa and in Andalusia in Europe. Caliph 'Umar had judged the Sassanian fiscal measures to be good enough to be continued in the provinces of Iraq and Iran; the Byzantine fiscal measures he found oppressive, and changed it in Syria and Egypt; and so on and so forth. The whole of the first century of the *Hijrah* was a period of adaptation, consolidation and transformation. The documents on papyrus, discovered in Egypt, inform us of many aspects of Egyptian administration. From the beginning of the second

century of the *Hijrah,* we possess codes of law, compiled by private jurists, one of the earliest of them being Zaid ibn 'Ali, who died in 120 A.H.

329. The ancients called Yemen "Arabia Felix," (as distinct from Arabia Petra and Arabia Deserta) and not without reason. The physical and other conditions had given it in pre-Christian antiquity an incomparable superiority over other regions of Arabia, as regards culture and civilization. Its wealth, as attested by the Bible, was legendary, and its kingdoms were mighty. At the beginning of the Christian era, a wave of emigration had led certain Yemenite tribes to Iraq, where they founded the Kingdom of Hirah, which was celebrated for its patronage of letters, and which continued to exist until the dawn of Islam. In the meanwhile, Yemen knew Jewish rule (under Dhu-Nuwas); Christian domination (under the Abyssinians) followed by the Magian or Parsi occupation of the Iranians, who in their turn yielded place to Islam. The Yemenites influenced by all these successive interactions and strains, were persuaded once again under Caliph 'Umar to emigrate to Iraq and populate it, particularly Kufah, which was a new town raised beside the old city of Hirah. 'Umar sent Ibn Mus'ud, one of the most eminent jurists from among the companions of the Prophet, to conduct a school there. His successors at the school, 'Alqamah an-Nakha'i, Ibrahim an-Nakha'i. Hammad, and Abu Hanifah were all, by providential chance, specialists in law. In the meantime, 'Ali, another great jurist among the companions of the Prophet, transferred the seat of the caliphate from Madinah to Kufah. Therefore it is not surprising that this town became the seat of uninterrupted traditions, and gained an ever-increasing reputation in matters of law.

330. The absence of all interference from the governmental authority in the liberty of the opinions of the judges and jurists proved greatly favourable for the rapid progress of this science; but it suffered from certain inconveniences too. In fact an experienced and high ranking administrator as Ibn-al-Muqaffa' complained in his *Kitab as-Sahabah* in the course of the second century of the *Hijrah,* of the enormous quantity of divergences in the Muslim case law, be that penal law, the law of personal status or any other branches of law, particularly in Basrah and Kufah: and he suggested to the caliph the creation of a supreme institution for the revision of the decisions of the judiciary and the imposition of a single, uniform law in all parts of the realm. The suggestion proved abortive. His contemporary, Abu-Hanifah, was jealous of the liberty of science, and solicitous of keeping it aloof from the turmoil of ever-changing politics. He created, instead, an academy of law. With its forty members, of whom each one was a specialist in a science auxiliary to law – such as the exegesis of the Qur'an, Hadith, logic, lexicology, etc. – this academy undertook the task of evaluating the case law of the time, and of codifying the laws: it tried also to fill up the gaps in Muslim law on points on which neither the text nor the precedents of the case law had pronounced any opinion. One of his biographers states that Abu- Hanifah (d. 150 H.) "had promulgated half a million rules" (cf *al-Muwaffaq*, 2/137) Malik at Madinah, and al-Auza'i in Syria, undertook at the same time a similar task, but they depended on their own solitary knowledge and personal resources. If Abu Hanifah laid an emphasis on reasoning (notwithstanding the recourse to the Qur'an and the Hadith as the basis of all law) Malik preferred the usage of the population of Madinah (a town impregnated with the traditions of the Prophet) to deduction or logical interpretation.

331. The Qur'an was "published" only a few months after the death of the Prophet. The task of collecting the data on the sayings and doings of the Prophet, as well as his tacit approval of the conduct of his companions (a material which is called Hadith) was undertaken by some persons in the life-time of the Prophet, and later by many others after the Prophet's death. More than a hundred thousand of the companions of the Prophet have left to posterity valuable traditions, based on whatever they remembered on the subject. Some put them down in writing (over fifty, according to the latest research) and others conveyed them orally. These materials of very high legal value were naturally dispersed in the three continents where the companions of the Prophet had gone and settled in the time of the caliphs 'Umar and 'Uthman. In the following generations, the researchers compiled treatises, even more comprehensive based on and amalgamating the collections of individual memoirs of the companions of the Prophet.

332. The evaluation of the case law and the codification of the *Hadith* were completed as parallel works at the same time, yet each ignored and was suspicious of the other. Ash-Shafi'i was born in the year in which Abu-Hanifah died. Mutual differences or disputes led the jurists to take greater cognizance of the *Hadith;* and the specialists of Hadith to put in order the data on the sayings and doings of the Prophet, to evaluate the individual merits of the sources of transmission, and determine the context and time of the different sayings

of the Prophet, for purposes of deducing the law therefrom. Ash-Shafi'i specialised simultaneously in law and in Hadith and thanks to his high intellectual qualities and his efforts, a synthesis was discovered between the two disciplines. Ash-Shafi'i is the first in world history to create an abstract science of law distinct from laws in the sense of rules applied in a country.

333. Another big school (or tradition) of law was founded by Ja'far as-Sadiq, a descendant of 'Ali and a contemporary of Abu Hanifah. Reasons of a political kind were responsible for the development of the law of inheritance in this school in a special manner. Abu Hanifah, Malik, ash-Shafi'i, Ja'far as-Sadiq and several other jurists each has left his school of law. The adherents of these schools form sub-communities of Islam in our age, yet the differences among them have an influence even less than that of the philosophic schools. With the passage of centuries, it has become a common experience to find that some Shafi'ites differ from ash-Shafi'i on certain points and hold the same opinion as Malik or Abu-Hanifah, and vice versa.

334. As we have just seen, the Muslim "empire" extended very early over immense territories, which were formerly governed by different legal systems, like the Iranian, Chinese, Indian, Byzantine, Gothic, and others, and to these were added the local contributions of the very first Muslims of Arabia. The possibility of any single foreign legal system having the monopoly of influencing Muslim law is therefore excluded. Among the founders of schools also we find that Abu-Hanifah was of Persian origin and Malik, ash-Shafi'i and Ja'far as-Sadiq were Arabs. The biographer adh-Dhababi reports that al-Auza'i was originally of Sindh. And in the subsequent generations there emerged Muslim jurists from all races. The development of Muslim law was therefore an "international" enterprise, in which Muslim jurists of very diverse ethnic origins, speaking different languages, and following different customs, have taken part. There were European Muslims from Spain, Portugal and Sicily, there were Chinese, Abyssinians, Indians, Persians, Turks and many others besides Arabs.

335. It is a phenomenon observed in all countries that certain extremists and those lacking in independent thought wish to sacrifice the spirit to the letter of the teaching of an old master, while others adventure into non-conformism. But it is the golden means that should always prevail! A spirit without an inferiority complex, but equipped with the necessary preparation in data, and endowed at the same time with the piety of a practising believer, will never encounter difficulty in finding interpretation practical, as well as reasonable, such as would even modify the opinion held by the ancients. With what confidence and assurance does the great jurist Pazdawi tell us that not only individual opinions, but even the consensus of former times can be replaced by a later consensus!

Conclusion

336. Muslim law began as the law of a State and of a ruling community and served the purposes of the community when the Muslim rule grew in dimension and extended from the Atlantic to the Pacific. It had an inherent capacity to develop and to adapt itself to the exigencies of time and clime. It has not lost its dynamism even today, in fact it is obtaining more and more recognition as an agency for good, by Muslim countries which were formerly under foreign political – and therefore juridical – domination, and are trying to reintroduce the *Shar'iah* in all walks of life.

[1] He died in 204 A.H./820 C.E.). He has had some predecessors, such as Abu Hanifah (d. 767) with his *Kitab ar-Ra'y* (ie., on the Juridical opinion), and this latter's two pupils Muhammad as-Shaibani and Abu Yousuf each of whom with a *Kitab Usul al-Fiqh* (On the Roots of Law). Yet none of them has come down to us, in order to judge them on the basis of their contents.

[2] Among those, who received invitation of the Prophet Muhammad to embrace Islam, there is also the King of Samawah, in Iraq. As to Palestine, the campaign to Tabuk attached Ailah, Jarba and Adhruh to the Islamic territory.

[3] For the conquest of part of Spain in the year 27 A.H. cf. Tabari, Dhahabi, etc.; and for that of Transoxiana or Chinese Turkestan in the same year, see Baladhuri, which fact is corroborated by Chinese historians also.

[4] ['usufruct' - (in Roman and Scots law) the right of enjoying the use and advantages of another's property short of the destruction or waste of its substance.]